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November 17, 2000



LONDON  
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**via Hand Delivery**

Vernon A. Williams, Secretary  
Surface Transportation Board  
1201 Constitution Avenue, N.W.  
Room 2215  
Washington, D.C. 20423

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Office of the Secretary

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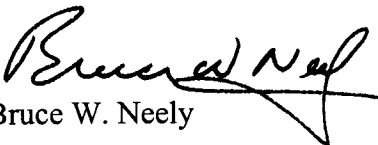
Re: Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures

Dear Secretary Williams:

Enclosed are the original and 25 copies of the "Comments of Enron Corporation" for filing in the above-referenced proceeding, and a diskette containing the Comments in WordPerfect format.

Also enclosed are three additional copies for data stamping and return via our messenger.

Very truly yours,

  
Bruce W. Neely

Attorney for Enron Corporation

Enclosures

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
SURFACE TRANSPORTATION BOARD

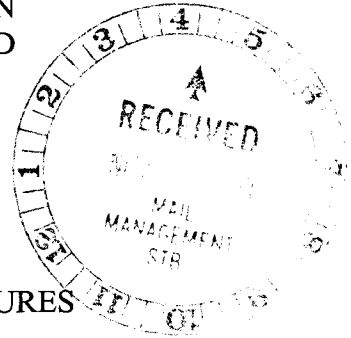
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EX PARTE NO. 582 (SUB-NO. 1)

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MAJOR RAIL CONSOLIDATION PROCEDURES



**COMMENTS OF ENRON CORPORATION**

Enron Corporation ("Enron") hereby submits its Comments on the Board's October 3, 2000 Notice of Proposed Rulemaking ("NPR"). The policy objectives the Board has endorsed in the NPR -- enhancement of competition, assurance of adequate service, and the concrete demonstration of benefits -- are a step in the right direction. But the NPR lacks the necessary specifics as to how these policy objectives are to be achieved and may not result in any improvement in the competitiveness of the rail industry. An example of this problem is the Board's proposed rule (§ 1180.1(c)(2)) that applicants must propose remedies to mitigate and offset competitive harms created by the merger. The only specific means of mitigating such harm the Board identifies are that gateways are to be kept open and that the rate for the challengeable segment in a bottleneck situation is to be preserved. These specifics are of minimal significance because the Board has not required that gateways be kept economically open while the requirement that the rate for the challengeable segment be preserved appears to be nothing more than a statement of existing law.

Much more can and should be done. Many commenters, including Enron, submitted in response to the Advanced Notice of Proposed Rulemaking specific proposals to mitigate the competitive harms that would result has the rail industry consolidates into a few remaining

railroads. Enron showed that the development of a secondary market for rail transportation capacity would mitigate many of the competitive harms that would result from further consolidation and, in fact, would enhance the overall competitiveness of the rail industry. Enron therefore urged the Board to require applicants to explain in their applications the steps they have taken to implement such a secondary market. But as it did with many of the other specific proposals submitted by the commenters, the Board neither adopted Enron's proposal nor rejected it. The Administrative Procedure Act requires the Board to do more -- it requires the Board to respond to the important comments of the parties and give its reasons for accepting or rejecting the comments.

Accordingly, Enron again urges the Board to require applicants in major rail merger, acquisition, and control proceedings to explain the steps they have taken to implement a secondary market for rail transportation capacity and to take these steps into account in determining whether the applicants have adequately mitigated the competitive harms resulting from the merger. To assist the Board, Enron is attaching a copy of its May 16, 2000 Comments on the Advanced Notice of Proposed Rulemaking.

Respectfully submitted,



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Attorneys for Enron Corporation

Due Date: November 17, 2000

Dated: November 17, 2000

## ATTACHMENT

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
SURFACE TRANSPORTATION BOARD

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EX PARTE NO. 582 (SUB-NO. 1)

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MAJOR RAIL CONSOLIDATION PROCEDURES

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COMMENTS OF ENRON CORPORATION

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Attorneys for Enron Corporation

Due Date: May 16, 2000  
Dated: May 16, 2000

**I.**  
**INTRODUCTION AND SUMMARY**

Enron Corporation ("Enron") hereby submits its Comments on the Board's March 31, 2000 Advanced Notice of Proposed Rulemaking ("ANPR"). In submitting these comments, Enron's primary purpose is to urge the Board to make way for the development of a secondary market for rail transportation in the United States - to allow entities interested in moving goods and materials by rail to secure such transportation rights from shippers who hold capacity on the railroads, and not exclusively from the railroad itself.

With the number of mergers and consolidations of railroad companies, we understand that the Board is very concerned that the pace of consolidation will result in all of the current rail lines in the country being held by no more than one or two large companies. With fewer and fewer rail carriers, there is less and less competition among rail carriers, and this makes it increasingly difficult for the Board in evaluating railroad mergers. With the substantial consolidation activity experienced already in the industry, how can the Board approve new merger proposals and still satisfy its charge from Congress - to consider the effect of the proposed merger on "on competition among rail carriers in the affected region or in the national rail system" and "the adequacy of the transportation to the public"? 49 U.S.C. § 11324(b)(1) and (5).

One way to immediately mitigate the anticompetitive effects of ongoing consolidation activities is to approve the development of a "virtual railroad" - an expansion of consumer access to rail transportation through the operation of a secondary market for such transportation. The concept of a "virtual railroad" is one that Enron spoke to, in general, in its Statement submitted

on February 29, 2000 in Ex Parte No. 582.<sup>1</sup> Here, Enron seeks to provide further detail on how a "virtual railroad" could work and why it would provide benefits to the public, to those interested in securing transportation by rail for goods and products, and to the railroads themselves.

To be clear, Enron is not asking the Board to prohibit new consolidations. Rather, Enron is proposing a vehicle that will mitigate many anticompetitive effects from further consolidation in the industry - perhaps enough to allow the Board to approve a future consolidation that otherwise would fail to satisfy the applicable standards. Accordingly, Enron urges the Board to revise its consolidation procedures to require applicants to explain in their applications the steps they have taken to implement a secondary market for rail transportation capacity, as more fully described below. The Board would then take the applicants' implementation of such a market into account in determining whether the consolidation should be approved.

## **II. COMMENTS**

### **A. How Would A Secondary Market For Railroad Capacity Work?**

First, railroads would continue to own and operate their physical rail networks. Enron is not proposing to place ownership or operational responsibility in the hands of shippers, nor is it proposing to mandate access to proprietary rail systems to third parties. Railroads would, however, be accountable for establishing standardized contracts that create shipper access to rail capacity at transparent, market-responsive prices.

Second, the industry standard contract would be fully transferable to other shippers and designed to promote a liquid secondary market for railroad capacity. While Enron recognizes

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<sup>1</sup> Enron's Statement in Ex Parte No. 582. Enron incorporates that statement by reference. For the Board's convenience, a copy is attached to this submission.

that all of the specific operational issues that could hinder contract transferability are not

addressed herein, a basic outline for how rail capacity markets could be established is as follows:

- 1) Railroads, shippers and other interested parties would work with the Board to establish an amenable standard capacity contract with the following general features:
  - Prices to be established by market conditions;
  - Delivery services to be priced between major rail "hubs";
  - Volume increments to be sufficiently large to create wholesale economics;
  - Performance commitments to be reinforced with liquidated damages; and
  - Delivery period and timing designed to reflect operational challenges.
- 2) Railroads would convert existing contracts to transferable capacity contracts and begin to sell new capacity contracts under prices and terms mutually agreeable to shippers and railroads.
- 3) A secondary market would be established by shippers, railroads and third parties, allowing all interested parties the ability to buy needed or sell unneeded capacity.
- 4) Railroads would respond to market price signals by adding or redeploying network capacity subject to operational and contractual constraints.
- 5) Customers holding contracts would request specific service. At some pre-specified time interval (e.g. 30 days prior to delivery), capacity markets would close for a given delivery period so that the railroads can schedule service.
- 6) Railroads would schedule trains to meet delivery requirements.
- 7) Shipper/railroad would make a final cash settlement to account for basis differences in actual service and contracted capacity (movement to and from hubs, weight of train, etc.), similar to the adjustments oil pipelines make to reflect differences in the quality of oil.

Finally, merger applicants would be free to propose additional features that would serve the Board's goals of fostering competition, increasing the overall quality and dependability of rail service, and advancing the public interest.



**B. How Is Competition Enhanced And The Public Interest Served By The Creation Of A Secondary Market For Rail Transportation Capacity?**

There are many benefits that result from the approach outlined above. First, the creation of a secondary market greatly *expands access to rail transportation* because it allows interested entities to secure rail capacity from shippers and not just from the railroad itself. Increases in the number of alternatives available to interested buyers will have positive competitive effects.

Second, transportation by rail is made *more attractive to potential customers*. Under the parameters above, customers can purchase a particular capacity path with a defined delivery date (for present or future service), and they can re-sell their capacity rights (either in full or in part) if they don't need it. This makes rail transportation more attractive to buyers than other types of transportation, and potentially more profitable for rail carriers.

Third, with rail capacity sold in segments, and to those willing to pay the highest price (coupled with the shipper's ability to re-sell its capacity rights), market forces are allowed to *identify where rail capacity is most valuable and where additional capital investment by the rail carrier is warranted*. This effect will directly contribute to the profitability of railroads.

Fourth, rail carriers will have a strong *incentive to improve the quality of service* to shippers and to find ways to make their operations more efficient because Shippers will be willing to pay higher prices for higher quality (e.g., faster) service. With the *incentive to operate more efficiently*, railroads are likely to find that they can free up additional capacity for sale, increase "throughput" (i.e., ton-miles and car-miles) and further increase revenues. The more efficient and effective the rail carrier operates on those rail segments found to be of the most value to shippers, the greater the potential for rail carriers to find solutions to constraint points, and the greater the level of revenue growth for those rail carriers.

Fifth, customers will have *greater flexibility* in arranging for delivery of their goods.

With capacity available by segment, customers can piece together their own, tailor-made, delivery path, combining capacity segments acquired directly from the railroad and those acquired on the open market from shippers. In this manner, they can secure delivery of their products on their own "virtual railroad".

Implementation of a secondary market for rail transportation capacity will not resolve all issues the Board will consider in this proceeding. For example, implementation of a capacity market will not affect, one way or another, the employee and cross-border issues the Board identified in the ANPR. Moreover, there will still be a need for the Board to consider other modifications to its merger procedures to enhance competition and safeguard service because the implementation of a capacity market may not be feasible on all railroads and it may not eliminate all competitive and service related concerns. But with the implementation of a secondary market for rail transportation capacity, these remaining issues will arise in an environment of improved service and enhanced competitive alternatives.

**C. A Secondary Market For Interstate Transportation Is In Place In Other Industries.**

Secondary markets for interstate transportation capacity are well established in other industries. Since the early 1990s, interstate transportation capacity on natural gas pipelines has been available on the secondary market. Enron owns several natural gas pipelines and also owns companies that ship natural gas across the country - not only on the Enron pipelines, but also on pipelines owned by others. It has become routine for entities seeking interstate natural gas transportation to secure capacity rights directly from shippers on the pipeline. Such transactions

generally are referred to as "capacity release" transactions. A large percentage of all interstate natural gas transportation capacity is sold in the secondary market.

The development of the secondary market interstate pipeline transportation capacity is the direct result of action taken by the Federal Energy Regulatory Commission ("FERC"), which regulates the interstate transportation of natural gas. In its landmark rulemaking, Order No. 636,<sup>2</sup> issued in 1992, the FERC mandated that interstate pipelines allow their shippers to release unwanted capacity rights for sale to others. Specifically, the FERC's Regulations require that "[f]irm shippers must be permitted to release their capacity, in whole or in part, on a permanent or short-term basis, without restriction on the terms or conditions of the release . . . ." 18 C.F.R. § 284.243(b) (1999). The FERC just recently remarked, in Order No. 637, why capacity release resulted in the development of a more competitive transportation market:

The Commission allowed firm holders of pipeline capacity to resell or release their capacity to other shippers and required pipelines to permit shippers to use flexible receipt and delivery points. Enabling firm shippers to resell their capacity created competitive alternatives to purchasing pipeline services. The ability to use flexible receipt or delivery points also expanded the capacity alternatives available to buyers of capacity because it meant that buyers were not restricted to using the primary points in the releasing shipper's contract. Capacity buyers could seek capacity from any number of firm capacity holders and use flexible point authority to inject and deliver gas at the points the purchasing shipper chose to use.

\* \* \*

The use of released capacity has made possible the development of *virtual pipelines*. A virtual pipeline can be created when a marketer or other shipper acquires capacity on interconnecting pipelines and can schedule gas supplies across the interconnect, creating in effect a new pipeline between receipt and

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<sup>2</sup> Order No. 636, *Pipeline Service Obligation and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs. [Regs. Preambles 1991-1996] ¶ 30,939 (1992) (subsequent history omitted).

delivery points that are not physically connected under a single pipeline management.

*Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, *III FERC Statutes and Regulations*, Regulations Preambles ¶ 31,091, at pp. 31,250 and 31,255 (2000) (emphasis added).

There are similar secondary markets being developed for interstate electric transmission capacity and band width.

These examples demonstrate that the economics of a secondary market for transportation capacity are compelling and that a secondary market can be implemented in a regulated industry, with benefits for all concerned parties.

**D. Proposed Changes to Regulations.**

The Board asked for specific proposals to amend the existing regulations. ANPR at 5. Enron proposes to amend 49 C.F.R. § 1180.1(c)(1) by adding at the end of the existing text the following:

In weighing whether the proposed transaction provides potential benefits to the applicants and to the public, the Board will take into account whether the applicants have established, or intend to establish, a secondary market for rail transportation capacity.

**III.  
CONCLUSION**

The development of a secondary market for rail transportation capacity, within the parameters identified in Section II.A., focuses directly on the Board's stated goals in revising its consolidation procedures: (i) enhancing competition, and (ii) improving service. Enron recommends that the Board revise its procedures to specifically require merger applicants to identify in their consolidation applications the steps they have taken to implement the type of

secondary capacity market addressed herein, or to demonstrate fully why they should not be made to implement such a secondary capacity market. The Board would then take the applicants' implementation of a capacity market (or failure to do so) into account in evaluating the effects of the proposed consolidation on competition, along with comments from shippers and others who might argue that the applicants should be required to implement such a secondary market as a condition of approval of the proposed consolidation.

Accordingly, the Board should adopt as an issue to be considered in major rail merger, acquisition, and control proceedings the implementation of a secondary market for rail transportation capacity and should amend 49 C.F.R. § 1180.1(c)(1) to add that the Board will take into account whether the applicant has established, or intends to establish, such a secondary market for rail transportation capacity with the minimum characteristics identified in Section II.A of these Comments.

Respectfully submitted,



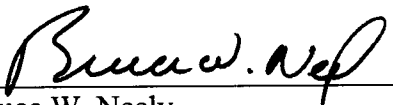
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Attorneys for Enron Corporation

Due Date: May 16, 2000  
Dated: May 16, 2000

## CERTIFICATE OF SERVICE

I certify that this 17th day of November, 2000, I have served a copy of the foregoing on all parties of record on the Service List in accordance with the Board's Rules of Practice.

  
\_\_\_\_\_  
Bruce W. Neely